Supreme Court, U.S.
FILED
APR 3 1995
CLERK

No. 94-1451

In the Supreme Court of the United States

OCTOBER TERM, 1994

PANTRON I CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JAY C. SHAFFER
Acting General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

MELVIN H. ORLANS
Attorney
Federal Trade Commission
Washington, D.C. 20580

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the court of appeals erred in ruling that it is a violation of Sections 5 and 12 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45 and 52, to promote the effectiveness of a hair growth product that has no inherent pharmacological efficacy, but works only by means of a placebo effect.

2. Whether the court of appeals erroneously shifted the burden of proof of product efficacy to petitioners.

3. Whether the court of appeals erred in concluding that petitioners' evidence of product effectiveness could not rebut the Federal Trade Commission's evidence of ineffectiveness because petitioners failed to account for the placebo effect.

4. Whether the court of appeals in fact ruled that a district court never has discretion under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), to refuse to award monetary equitable relief.

5. Whether the court of appeals erred in directing an award of monetary equitable relief in this case, even though some consumers may have experienced satisfactory results due solely to a placebo effect.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	13
American Home Prods. Corp. v. *FTC*, 695 F.2d 681 (3d Cir. 1982)	10
Basic Books, Inc. v. *FTC*, 276 F.2d 718 (7th Cir. 1960)	15
Bristol-Myers Co., 102 F.T.C. 21 (1983), enforced, 738 F.2d 554 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985)	8, 9
City of Revere v. *Massachusetts General Hospital*, 463 U.S. 239 (1983)	15
Director, OWCP v. *Greenwich Collieries*, 114 S. Ct. 2251 (1994)	11
FTC v. *Amy Travel Service*, 875 F.2d 564 (7th Cir.), cert. denied, 493 U.S. 954 (1989)	15, 16
FTC v. *Warner Communications Inc.*, 742 F.2d 1156 (9th Cir. 1984)	15
Feil v. *FTC*, 285 F.2d 879 (9th Cir. 1960)	9
Independent Directory Corp. v. *FTC*, 188 F.2d 468 (2d Cir. 1951)	15
Koch v. *FTC*, 206 F.2d 311 (6th Cir. 1953)	9
Original Cosmetics Prods. v. *Strachan*, 459 F. Supp. 496 (S.D.N.Y. 1978), aff'd mem., 603 F.2d 214 (2d Cir.), cert. denied, 444 U.S. 915 (1979)	8, 9
Quinn v. *Millsap*, 491 U.S. 95 (1989)	15

Cases—Continued: Page

Thompson Medical Co. v. *FTC*, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987) 9
United States v. *An Article . . . Acu-Dot*, 483 F. Supp. 1311 (N.D. Ohio 1980) 8, 9
United States v. *Burr*, 25 F. Cas. 30 (C.C. Va. 1807) (No. 14,692(d)) 13
Warner-Lambert Co., 86 F.T.C. 1398 (1975), aff'd as modified, 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978) 8, 9, 10
Warner-Lambert Co. v. *FTC*, 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978) 8

Statutes and regulation:

Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*:
§ 5(a), 15 U.S.C. 45(a) 4
§ 12, 15 U.S.C. 52 4
§ 13(b), 15 U.S.C. 53(b) 4, 13
28 U.S.C. 2106 14
21 C.F.R. 310.527 3

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1451

PANTRON I CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-42) is reported at 33 F.3d 1088. The district court's judgment, findings of fact and conclusions of law, and memorandum of opinion and intended judgment (Pet. App. 45-67) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1994. A petition for rehearing was denied on November 16, 1994. Pet. App. 43. On February 9, 1995, Justice O'Connor entered an order extending the time within which to file a petition for a writ of certiorari to and including March 16, 1995.

The petition for a writ of certiorari was filed on March 1, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the Pantron I Corporation (Pantron) and Pantron's president and sole owner, Hal Lederman. Petitioners market an anti-baldness nostrum called the "Helsinki Formula." The Helsinki Formula is a non-prescription, topically applied product that typically consists of a conditioner and a shampoo. The allegedly active ingredients in the Helsinki Formula are polysorbate 60 and polysorbate 80, two chemicals found in a wide variety of consumer products, including many foods. Petitioners sell a three-months' supply of the Helsinki Formula for $49.95, plus shipping and handling charges. Pet. App. 3-4, 49-51.

The Helsinki Formula has been heavily promoted through print advertisements and television commercials (including late-night infomercials hosted by the "Man from U.N.C.L.E.," Robert Vaughn). Petitioners' widely disseminated advertising for the Helsinki Formula represents that the product is effective in arresting hair loss and promoting hair regrowth, and also that its effectiveness has been established by reliable and authoritative scientific studies.[1] Pet. App. 4-5, 51. The probative medical and scientific

---

[1] For example, the television advertisements referred to "the Helsinki Formula breakthrough, a product that has actually been found to stop hair loss and even rejuvenate hair growth." Pet. C.A. Supp. Exc. R. 13. The advertisements also stated that the Helsinki Formula was "developed by medical doctors, and tested by medical doctors with a very high rate of success." *Id.* at 14.

evidence clearly establishes, however, that any perceived effectiveness of the Helsinki Formula is attributable solely to its "placebo effect."[2] *Id.* at 19-21. In other words, the Helsinki Formula has no inherent, or pharmacological, effect in treating baldness.[3] See *ibid.*

Petitioners were aware that their effectiveness claims for the Helsinki Formula were unsupported by valid scientific evidence. From 1982 through 1989, petitioners were informed by the Food and Drug Administration, the United States Postal Service, the Los Angeles District Attorney, and even the National Advertising Division of the Council of Better Business Bureaus that claims of efficacy and scientific support for the Helsinki Formula were inaccurate and unfounded. Pet. App. 4-5, 36-38. Nonetheless, petitioners persisted in making those false and deceptive claims. See *ibid.*

---

[2] The "placebo effect" refers to the positive results that may be obtained from use of an inactive drug due to psychological or other reasons, rather than to any pharmacological effect. Pet. App. 2 n.1. In the case of purported hair growth products like the Helsinki Formula, the placebo effect has both a subjective component (arising from consumers' misperceptions of hair growth) and an objective component (actual, measurable hair growth that is likely caused, not by any pharmacological effect of the drug, but from the scalp stimulation associated with massaging any substance, including plain water, into the scalp on a regular basis). *Id.* at 21.

[3] The Federal Food and Drug Administration (FDA) has issued a regulation prohibiting marketers of all nonprescription products from making any baldness treatment claims on their labels. See 21 C.F.R. 310.527. The FDA regulations govern labeling, not advertising, and thus do not directly proscribe the conduct at issue in this case.

2. On November 14, 1988, the Federal Trade Commission filed a complaint in district court, pursuant to Section 13(b) of the Federal Trade Commission Act (FTC Act or Act), 15 U.S.C. 53(b), alleging that petitioners were engaged in unfair and deceptive marketing practices and in the dissemination of false advertisements, in violation of Sections 5(a) and 12 of the Act, 15 U.S.C. 45(a) and 52. The Commission sought permanent injunctive relief and monetary equitable relief in the form of restitution or disgorgement. Pet. App. 5. On September 24, 1991, the court issued findings of fact and conclusions of law, and on July 22, 1992, rendered its final judgment. In its final decision, the court granted in part and denied in part the Commission's request for permanent injunctive relief, and denied completely the Commission's request for monetary equitable relief. *Id.* at 45-67.

In its decision, the district court agreed with the Commission that petitioners' advertisements in fact made the two challenged representations, namely, that the Helsinki Formula is effective to arrest hair loss and to promote hair regrowth, and that the product's efficacy is demonstrated by recognized scientific studies. The district court concluded, however, that the claims of efficacy were not false or misleading, because it believed that there was "no evidence * * * to support a contention that the Helsinki Formula is wholly ineffective." Pet. App. 51, 61. The court reasoned that the evidence supporting the Helsinki Formula's effectiveness, while "no[t] scientifically valid" (*id.* at 54), was nonetheless sufficient to establish that the product "most probably works some of the time for a lot of people." *Id.* at 53, 61. As for petitioners' claims of scientific

support, the court ruled that the Commission had established, "by a bare preponderance of the evidence," that such claims "are unjustified in light of modern and accepted standards for research/analysis and scientific reporting." *Id.* at 54.

In its final judgment, the court granted the Commission a limited permanent injunction. Although the injunction prohibited misrepresentations of product efficacy, it permitted petitioners to advertise that "the Helsinki Formula is effective to some extent for some people in dealing with male pattern baldness," if that claim was accompanied by disclosures that the product's effectiveness is more likely to involve arrest of hair loss than hair regrowth, and is not explained or supported by scientific studies recognized under current standards in this country. Pet. App. 46. The injunction also prohibited representations of scientific support, but permitted petitioners to state that the Helsinki Formula "was the subject of medical investigative work by responsible European physicians," if petitioners disclosed that the work did not conform to recognized standards in this country. *Ibid.*

The district court refused to award disgorgement of profits or other monetary equitable relief. It reasoned that there was no consumer injury because individuals "who may be perceived to have been damaged have been so in very modest amounts," and because Pantron's customers "had—albeit rarely exercised—a right to recompense" through petitioners' advertised money-back guarantee. Pet. App. 67. The court also ruled that the Commission had not established, for purposes of demonstrating individual liability for monetary relief, that petitioner Leder-

man knew or should have known that Pantron's conduct was dishonest or fraudulent. *Id.* at 59.

3. The Commission appealed the district court's rulings that petitioners' claims of product efficacy were not false or misleading, and that petitioners should not be ordered to pay monetary equitable relief. The court of appeals reversed and directed the district court to modify its injunction to prohibit petitioners from making any representations that the Helsinki Formula is effective in arresting hair loss or promoting hair regrowth. The court of appeals also directed the district court to order petitioners to pay monetary equitable relief. Pet. App. 1-42.

On the issue of liability, the court of appeals held that the district court had committed legal error by requiring the Commission to prove that the Helsinki Formula was "wholly ineffective" to show that petitioners' representations of product efficacy were false advertisements or deceptive practices. The court of appeals concluded that the standard applied by the district court was legally incorrect because it imposed on the Commission the impossible burden of demonstrating that the Helsinki Formula did not have even a placebo effect. The court reasoned that, where the evidence demonstrates that a product's effectiveness arises solely as a result of the placebo phenomenon, a representation that the product is effective is false and deceptive for purposes of the FTC Act. Pet. App. 19, 27.

The court of appeals also concluded that the district court's reasons for denying monetary equitable relief were inadequate as a matter of law, and that application of the correct legal principles to the undisputed facts required monetary relief. Specifically, the court of appeals rejected as legally

insufficient the three grounds given by the district court for denying monetary relief—that economic injury alone was insufficient; that modest individual economic injury was not compensable; and that the existence of a money-back guarantee precluded such relief. Pet. App. 34-35. Because "an application of the proper [legal] principles compels an order of monetary relief," the court of appeals instructed the district court to enter an order requiring the payment of monetary equitable relief, in an amount equal to Pantron's unjust enrichment. *Id.* at 35-36.

Finally, the court of appeals ruled that the district court abused its discretion in refusing to hold petitioner Lederman personally liable for monetary relief. The court held that the evidence before the district court "clearly established that Lederman acted with at least 'reckless indifference to the truth or falsity' of Pantron's representations that scientific support existed for its efficacy claims." Pet. App. 36. The court also concluded that there was "no doubt from the record that Lederman was aware of a high likelihood that the company's claims of scientific support were false." *Id.* at 37.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. Petitioners contend (Pet. 13) that the court of appeals erred in prohibiting them from making efficacy claims for their Helsinki Formula hair growth product because, even if those claims were based solely upon the product's placebo effect, the claims were nonetheless "truthful." It has long been

recognized, however, by the Commission and reviewing courts in cases under the FTC Act, and by the courts in the context of other consumer-protection statutes, that it is unlawful to promote the efficacy of a product that works only by means of a placebo effect. See, *e.g.*, *Bristol-Myers Co.*, 102 F.T.C. 21, 336 (1983), enforced, 738 F.2d 554 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985); *Warner-Lambert Co.*, 86 F.T.C. 1398, 1495-1496 (1975), aff'd as modified, 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978); see also *United States* v. *An Article . . . Acu-Dot*, 483 F. Supp. 1311, 1314-1315 (N.D. Ohio 1980) (misbranding under Food, Drug, and Cosmetic Act); *Original Cosmetics Prods.* v. *Strachan*, 459 F. Supp. 496, 506 (S.D.N.Y. 1978) (use of mails to obtain money through false representations), aff'd mem., 603 F.2d 214 (2d Cir.), cert. denied, 444 U.S. 915 (1979). As the Commission has explained, it "cannot accept as proof of a product's efficacy a psychological reaction stemming from a belief which, to a substantial degree, was caused by [the marketer's] deceptions." *Warner-Lambert Co.*, 86 F.T.C. at 1496. Similarly, under the Federal Food, Drug, and Cosmetic Act, a label is considered "misleading" where "the device is not *inherently* effective, its results being attributable to the psychosomatic effect produced by the advertising and marketing of the device." *Acu-Dot*, 483 F. Supp. at 1315.

Were a placebo effect sufficient to establish efficacy for purposes of the FTC Act, then sugar pills could lawfully be advertised for the relief of pain, since "[p]eople who are given medication for an ailment frequently feel better because they think they should, even though the product has no therapeutic value." *Warner-Lambert Co.* v. *FTC*, 562 F.2d at 754 n.9.

Hence, far from creating a "new category of false advertisement" (Pet. 11), the decision of the court of appeals merely recognizes the well established, common sense principle that a product may not be promoted as effective if the product works no better than a placebo.

Petitioners argue (Pet. 11) that the court of appeals' construction of the FTC Act would prohibit truthful statements in advertising. It has long been clear, however, that the FTC Act proscribes even literally truthful statements when such statements might reasonably be interpreted in a misleading manner.[4] Thus, petitioners' efficacy claims, even if literally true because of the placebo effect, are misleading because the product is not "*inherently* effective."[5] As the court of appeals observed, consumers purchasing a hair growth product such as the Helsinki Formula undoubtedly do so in the belief that the product has some therapeutic, pharmacological, value. Pet. App. 27.

The misleading and deceptive nature of petitioners' advertising claims is not cured by either the existence of some satisfied consumers or the fact that the Helsinki Formula is not unsafe. Evidence of consumer satisfaction is meaningless in a case of this kind; by definition, such evidence will exist whenever

---

[4] *Thompson Medical Co.* v. *FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987); *Feil* v. *FTC*, 285 F.2d 879, 896 n.27 (9th Cir. 1960); *Koch* v. *FTC*, 206 F.2d 311, 317 (6th Cir. 1953).

[5] *Acu-Dot*, 483 F. Supp. at 1315; see *Original Cosmetics Prods.*, 459 F. Supp. at 506; *Bristol-Myers Co.*, 102 F.T.C. at 336; *Warner-Lambert Co.*, 86 F.T.C. at 1496.

there is a placebo effect.[6] Also meritless is petitioners' suggestion (Pet. 14) that, because the Helsinki Formula poses no risk of physical harm, its promotion as an effective hair growth product should be countenanced based on its placebo effect alone. As the court of appeals noted, "a major purpose of the [FTC] Act is to protect consumers from economic injuries." Pet. App. 34. The FTC Act protects consumers from being misled into paying for products that are worthless, even if those products are not harmful to their health.

2. Petitioners argue (Pet. 15-19) that the court of appeals inappropriately shifted the burden of proof to them to show that their product was effective. That contention is incorrect. The court of appeals ruled that the district court erred in requiring the Commission to carry the insurmountable burden of proving that the Helsinki Formula was "wholly ineffective." Pet. App. 24. The district court erred as a matter of law by accepting a placebo effect as proof of efficacy; as a consequence of that mistake, it erred further by requiring the Commission to negate even the possibility of a placebo effect to prove that petitioners' efficacy claims were misleading and violated the FTC Act. See *id.* at 19, 24, 27. As the court of appeals explained, it is misleading under the

---

[6] In addition, consumers have difficulty in evaluating the efficacy of the Helsinki Formula because hair loss proceeds at an irregular rate (Pet. App. 22a; Tr. 88-89; Pons Dep. 88), and because the Helsinki Formula contains ingredients that coat the hair and make it appear thicker (Pons Dep. 86). These factors would all lead consumers incorrectly to attribute perceived improvement to a supposed pharmacological effect. Cf. *American Home Prods. Corp.* v. *FTC*, 695 F.2d 681, 698 (3d Cir. 1982); *Warner-Lambert Co.*, 86 F.T.C. at 1495-1496.

FTC Act to promote as effective a product that works only by means of a placebo effect, even though some consumers may experience positive results. *Id.* at 27. The court of appeals correctly held that, to prevail, the Commission was required only to "demonstrat[e] that the [Helsinki Formula] has no force beyond its placebo effect." *Id.* at 19.

Although the court of appeals corrected the legally erroneous burden of proof imposed by the district court, the burden of persuasion nonetheless remained at all times on the Commission to demonstrate that the Helsinki Formula was no more effective than a placebo.[7] Assessing the totality of the evidence under the correct legal standard, the court of appeals concluded that "[t]he evidence before the district court made clear that there is no reason to believe that the Helsinki Formula is at all effective outside of its placebo effect." Pet. App. 29. In other words, the court of appeals ruled that the Commission had carried the proper burden of proof.

3. Petitioners also argue (Pet. 16-17) that the court of appeals erred in rejecting evidence of scientific support for the pharmacological efficacy of

---

[7] As in the typical case, the Commission was required to produce evidence sufficient to establish a *prima facie* case, and the burden of production (but not the burden of persuasion) then shifted to petitioners to rebut the Commission's case by presenting evidence that the Helsinki Formula was effective beyond its placebo effect. See generally *Director, OWCP* v. *Greenwich Collieries*, 114 S. Ct. 2251, 2255-2257 (1994). Petitioners could have carried their burden of production by producing evidence, such as valid and reliable placebo-controlled studies, demonstrating that the Helsinki Formula was more effective than a placebo, but they were unable to do so.

the Helsinki Formula merely because that evidence would not satisfy standards acceptable to the "American medical community." That argument misapprehends why the court of appeals rejected petitioners' purported evidence of scientific support. As the court of appeals recognized, the Commission put forth substantial scientific evidence demonstrating that the Helsinki Formula has no effectiveness beyond its placebo effect—consisting, *inter alia*, of the testimony of three medical experts, the consensus view of the medical/scientific community, and a published, peer-reviewed, double-blinded, placebo-controlled clinical study concluding that one of the supposedly active ingredients of the Helsinki Formula has no effect on hair growth. See Pet. App. 5-9, 19-20. In contrast, petitioners' evidence consisted of studies that did not meet basic scientific norms (including one "uncontrolled, unblinded, unrandomized, un-peer-reviewed study," and other similarly defective studies) and the testimony of two physicians based on those studies. *Id.* at 9-11. None of petitioners' evidence accounted or controlled for the placebo effect, which was acknowledged by petitioners' experts as well as the Commission's, *id.* at 20, 24, and therefore none of it was capable of rebutting the strong evidence that polysorbate-based products such as the Helsinki Formula are no more effective than a placebo. *Id.* at 21-23.[8]

---

[8] Petitioners maintain (Pet. 17) that rejection of their evidence of customer satisfaction is tantamount to suggesting that "consumers are *too stupid* to know what is good for them and incapable of determining whether their hair is growing or whether their hair loss is decreasing." But the existence of a substantial placebo effect, in combination with other factors (*e.g.*, the irregular rate of hair loss and the inclusion in the

4. Petitioners argue (Pet. 19-23) that the court of appeals erred in ruling that a district court, acting under Section 13(b) of the FTC Act, may not, in the exercise of discretion, decline to award monetary equitable relief (*i.e.*, restitution or disgorgement). The court of appeals made no such ruling, however; it held only that the district court had denied monetary relief based on the application of erroneous legal principles, and that application of the proper principles to the facts of this particular case compelled an order of monetary relief. See Pet. App. 35. The court of appeals then remanded the case to the district court, with instructions to order petitioners to pay monetary equitable relief, in an amount to be determined by the lower court. *Id.* at 35 & n.34, 36, 38, 42. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) ("[S]uch discretionary choices are not left to a [district] court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'") (quoting Marshall, C.J., in *United States* v. *Burr*, 25 F. Cas. 30, 35) (C.C. Va. 1807) (No. 14,692(d)).

In reaching its conclusion that monetary relief was required in this case, the court of appeals correctly rejected, as legally insufficient and even contrary to common sense, the three premises for the district court's refusal to award monetary relief. First, the court of appeals overturned the district court's conclusion that such relief should not be awarded when "consumer injuries have been only economic in

---

Helsinki Formula of an ingredient that coats the hair and makes it appear thicker), amply demonstrates that consumers may well be incapable of evaluating whether the Helsinki Formula has any inherent effect. Pet. App. 22.

nature." Pet. App. 34; see *id.* at 57. The district court's error in that respect is self-evident; since a major purpose of the FTC Act is to protect consumers from economic injuries, the remedy of restitution to correct unjust enrichment is "particularly suited" to the FTC Act, and to deny restitutionary relief would "pervert the purposes of * * * the Act." *Id.* at 34. Second, the court of appeals rejected the district court's reliance on the fact that each consumer had suffered only a modest economic injury; as the court noted, "consumer injury is substantial when it is the aggregate of many small individual injuries," and to deny disgorgement on the basis of the size of the injury to each consumer would, in effect, condone unjust enrichment. *Ibid.* Third, the court of appeals correctly rejected the district court's reliance on petitioners' money-back guarantee for dissatisfied customers. If such an offer were dispositive, "the false advertising prohibitions [would be] a nullity," since "[a]nything might then be advertised as long as unsatisfied customers were returned their money." *Id.* at 35. Indeed, many dissatisfied customers will not bother to request a refund, precisely because of the small size of the individual injury, and of course customers deceived by the placebo effect of the product will not request a refund.

Once the court of appeals determined that the district court had committed legal error in denying monetary relief, it was appropriate for the court of appeals to apply the correct legal principles and to order proper redress, rather than merely remanding to the district court without instructions. See 28 U.S.C. 2106 (authorizing courts of appeals to exercise broad discretion on disposition). Since the complete record was before the court of appeals, "there would

be little point in remanding the case merely to allow the [district court] to reconsider its holding under [appropriate legal principles]." *City of Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 244 n.6 (1983); accord *Quinn* v. *Millsap*, 491 U.S. 95, 106-107 (1989); see, *e.g.*, *FTC* v. *Warner Communications Inc.*, 742 F.2d 1156 (9th Cir. 1984) (court of appeals ordered entry of preliminary injunction after concluding that district court had denied injunction under incorrect legal standards).

5. Finally, petitioners err in contending (Pet. 23) that monetary equitable relief is inappropriate in this case because there are at least some satisfied consumers who presumably believe that the Helsinki Formula is effective. The record demonstrates that any evidence of consumer satisfaction or product effectiveness is attributable solely to a placebo effect. Even satisfied consumers are entitled to monetary relief, for they were deceived into purchasing a product that they were misled to believe had some inherent pharmacological value.

Moreover, it is settled law that the existence of some satisfied consumers does not constitute a defense under the FTC Act. See, *e.g.*, *FTC* v. *Amy Travel Service*, 875 F.2d 564, 572 & n.7 (7th Cir.), cert. denied, 493 U.S. 954 (1989); *Basic Books, Inc.* v. *FTC*, 276 F.2d 718, 721 (7th Cir. 1960); *Independent Directory Corp.* v. *FTC*, 188 F.2d 468, 471 (2d Cir. 1951). The Commission "need not prove that every consumer was injured." *Amy Travel Service*, 875 F.2d at 572. At most, petitioners' argument might warrant the exclusion, on remand, of any demonstrably satisfied consumers (*e.g.*, consumers who repurchased the product or otherwise attested to its

perceived effectiveness) in computing the amount of monetary equitable relief. See *id.* at 572 & n.7.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JAY C. SHAFFER
Acting General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

MELVIN H. ORLANS
Attorney
Federal Trade Commission

APRIL 1995

---

[9] The court of appeals remanded the case to the district court to permit it to "tailo[r] the appropriate monetary relief." Pet. App. 35 n.34.